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No. 946

IN THE

# Supreme Court of the United States

October Term, 1963

SECURITY STATE BANK OF PHARR, TEXAS,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

## Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner prays that Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's judgment in this cause entered on the 27th day of November, 1963.

### Opinions Below

The opinion of the District Court, included in this petition as an appendix, is reported in 211 Federal Supp. 798.[1]

The opinion of the Court of Appeals, included in this Petition as an appendix, is reported in 325 Federal 2nd 92.[2]

[1] Appendix, Page 1.
[2] Appendix, Page 11.

## Jurisdiction

The judgment of the Court of Appeals was entered on the 27th day of November, 1963. Petition for rehearing was denied on December 27, 1963. A motion for leave to file second petition for rehearing was filed on January 16, 1964, and submitted to the Court, and leave to file such petition was granted and the petition denied on March 11, 1964.

The jurisdiction of this Court is invoked under Article 1254 (1) of Title 28, U.S.C.A.

## Questions Presented

This Petition for Writ of Certiorari is respectfully sought under the provisions of Rule 19(b) because the Court of Appeals has decided an important state question, concerning the constitutionality of a significant state statute, in a manner which is in conflict with applicable state law as enunciated by the Supreme Court of the State of Texas. The Courts below have purported to rely on the law of Texas, citing as their only authority a 1924 Texas Commission of Appeals Case. That case was also cited, but in effect distinguished by the later controlling Texas Supreme Court authorities, that are relied upon by Petitioner. The Texas Supreme Court on November 20, 1963 (7 days before the opinion of the Court of Appeals was delivered on November 27, 1963) delivered an opinion in a case similar to the case at bar reaching the opposite result and citing with approval the principal authority relied upon by Petitioner, which was rejected by the Court of Appeals. After the opinion of the Texas Supreme Court was first published in advance sheet form, on December 31, 1963, it was called to the attention of the Court of Appeals, but summarily overruled by them. These matters are

more fully discussed in the argument below.

This suit, essentially, involves the question of priorities of claims, as between Petitioner and Respondent United States of America, to funds interpled by a contractor as due to one of his subcontractors under a construction contract. Petitioner's claim, prior in time, is based upon an assignment of the proceeds of the subcontract. Respondent's claim is based upon certain tax liens for withholding taxes which accrued and were filed after the date of Petitioner's assignment. The ultimate question presented for review by this Court is the determination of the priorities of the claims to the funds interpled, as between Petitioner and said Respondent, since the claims of each are in excess of the funds interpled.

The District Court and the Court of Appeals, have held, in effect, that Petitioner's claim is based upon an inchoate and unperfected assignment, because Petitioner's assignment of a construction subcontract failed to describe the land upon which improvements were to be constructed, and Petitioner failed to file the assignment in the County where the land is situated, in accordance with the purported provisions of House Bill 698, Acts of 1957, Fifty-fifth Legislature, Page 818, Chapter 348, Section 1, an amendatory act amending Article 260-1, Vernon's Texas Civil Statutes.

It has been Petitioner's consistent position that the above requirements of such amendatory act are unconstitutional under the Constitution of the State of Texas for the reason that the caption of such amendatory act failed to give fair notice of the inclusion of such requirements, in the amendatory act; that the established case law of the State of Texas as enunciated by its Supreme Court mani-

festly establishes the unconstitutionality of the above provisions; that the Federal Courts are bound by the precedents of state law as to the unconstitutionality of state statutes under a state constitution; and that Petitioner complied with the valid and constitutional provisions of Article 260-1, Vernon's Texas Civil Statutes, by recording a notice of its assignment in the County of the principal place of business of the subcontractors. In the alternative, Petitioner contends that if the constitutional provisions of such statute do not authorize the recordation of assignments of construction contracts, then its assignment was perfected and not inchoate irrespective of recordation.

**Constitutional Provisions and Statutes**

The applicable provision of the Constitution of the State of Texas as to the requirements of the notice required in the caption of a statute, as to the provisions to be contained in the body thereof, are set forth in Article III, Section 35 of the Texas Constitution, which provides:

> "Sec. 35. No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, *which shall be expressed in its title*. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed." (Emphasis added)

The ultimate disposition of this case must turn upon the application of the above constitutional provision to the 1957 amendment to Article 260-1, Vernon's Texas Civil Statutes. Article 260-1 was first enacted by the Texas Legislature in 1945,

Forty-ninth Legislature, Page 460, Chapter 293, which, because of its length, is set forth in the appendix hereto at Page 12. Thereafter, the Texas Legislature amended said act in 1955, Fifty-fourth Legislature, Page 822, Chapter 302, which amendment is also set forth in the appendix hereto at Page 17. Finally, in 1957 the amendment with which this Court is presently concerned was enacted as House Bill 698, Acts of 1957, Fifty-fifth Legislature, Page 818, Chapter 348. This is set forth in full in the appendix hereto at Page 21.

## Statement of the Case

A rather thorough statement of most of the pertinent facts and issues involved in the instant case may be found in the opinion of the District Court (appendix, Page 1) and for this Court's convenience, the District Court's statement will be here summarized, and then the additional matters pertinent to this proceeding will be set forth.

Respondent, W. B. Uhlhorn filed an action in the nature of a Bill of Interpleader, interpleading funds due its subcontractors, against Paul Owens and Jack Dooley individually and d/b/a Valley Lathing and Plastering Company, as subcontractors, Petitioner Security State Bank, Pharr, Texas, Respondent United States of America and other named defendants, in a State District Court. Since the claims of all the defendants not named above were denied by the District Court, and they have not appealed from the judgment of the Court, they are not further noticed in this Petition.

Respondent United States of America removed the case to the United States District Court for the Southern District of Texas, Brownsville Division, and thereafter, with leave of the Court, filed an intervention. (R. 146)

The District Court in its opinion found that Respondent Uhlhorn had the primary contract to construct a certain housing project at Falcon Heights, Texas, for the International Boundary and Water Commission. A portion of the work was subcontracted to Defendant Paul Owens Lathing Company, on or about April 27, 1960, and the obligation of said subcontract was assumed by and transferred to the defendants, Owens and Dooley, d/b/a Valley Lathing and Plastering Company, who proceeded to perform the work there called for. (R. 146)

The District Court further found that on May 14, 1960, the above subcontractors assigned all proceeds due under said subcontract to Petitioner Security State Bank, Pharr, Texas, and authorized Uhlhorn to make checks payable jointly to the subcontractor and Petitioner. Petitioner, under said assignment, made advances to the subcontractors, and at the times material to this appeal the amounts still owed by said subcontractors on such advances were in excess of the amount interpled. (R. 146, 147) The claims of the United States of America were based upon certain tax liens, for withholding taxes, which accrued and were filed after the date of the assignment of the subcontract to Petitioner. The amount claimed by the United States of America was also in excess of the funds interpled by the Respondent Uhlhorn. (R. 149)

The District Court, by its judgment, awarded the funds interpled in this suit to Respondent United States of America, holding in its published opinion that Petitioner's assignment was inchoate and unperfected, despite the fact that such assignment was made prior to the filing of the Government tax liens.

An appeal was perfected to the United States Court of Appeals, Fifth Circuit, which in a per

curiam opinion dated November 27, 1963, affirmed the judgment of the trial court, adopting the reasoning contained in that court's opinion.

Petitioner has perfected this appeal against the United States of America, and against W. P. Uhlhorn who filed the Bill of Interpleader, contending that the District Court and the Court of Appeals erred in awarding the funds here interpled to the United States of America. On the basis of the foregoing statement, this Petition presents for this Court's determination the correctness of the decisions of the courts below, which awarded the sums here interpled to the United States of America.

In effect, the opinion of the District Court, which was approved per curiam by the Court of Appeals, held that Petitioner's assignment failed to describe the land upon which the construction was to be done, and that the assignment itself is not recorded in the County in where the construction was to be done, and that, therefore, Petitioner had failed to comply with applicable provisions of Article 260-1, Vernon's Texas Civil Statutes.

On this basis, the lower Courts held that Petitioner's attempted recording of such assignment was ineffective, and that, therefore, such assignment was inchoate and unperfected as against the subsequent tax liens of the United States of America. In this connection, the lower Courts specifically rejected Petitioner's contentions: (a) that the state recording statute was unconstitutional and invalid insofar as these requirements are concerned; (b) that Petitioner had complied with the *constitutional* provisions of the recording statute by recording a notice of such assignment in the county of the principal place of business of the subcontractor, and was entitled to its priority by virtue of the fact of

its prior recording and; (c) that, in the alternative, if the Court held that the constitutional provisions did not authorize the recordation of construction contracts, Petitioner was entitled to priority irrespective of recordation under applicable federal law. These matters will be further developed in the argument below.

**Jurisdiction of the District Court**

The Bill of Interpleader here in question was filed in State Court, citing both Petitioner and Respondent, United States of America (R. 89). The action was removed by Respondent United States of America to the United States District Court for the Southern District of Texas, Brownsville Division, as an action ~~in~~ which the United States of America was a party, (R. 102). Said removal constitutes the jurisdictional basis of the federal court.

**Argument**

The disposition of this case must of necessity turn upon the question of the constitutionality, under the Texas Constitution, of the purported provisions of Article 260-1, Vernon's Texas Civil Statutes, requiring that an assignment of a construction contract must identify the land upon which the improvements are to be erected, and that the assignment itself must be recorded in the county where such land is located. Since the undisputed record discloses that Petitioner did not comply with these requirements, therefore, the question of constitutionality will first be discussed.

First, it must be noted that the question here before the Court concerns the constitutionality of a State statute under the provisions of the State Constitution. Manifestly, there can be no question but that the Federal Courts are bound by the rulings of

the highest court of the State of Texas in their determination of this question. Cyclopedia of Federal Procedure, Third Edition, Volume 3, Section 618, Page 190; *Neblett* v. *Carpenter* 59 S.Ct. 170, 305, U.S. 297, 83 L. Ed. 182 (1938); *Alton Railroad Company* v. *Illinois Commerce Commission*, 59 S.Ct. 340, 305 U.S. 548, 83 L. Ed. 344 (1939).

In this connection, it should be remembered that this is a case which was first filed in the State Court, and removed to the Federal Court solely because the United States of America is a party hereto. Therefore, it is respectfully submitted that in accordance with the principals enunciated by this Court in *Erie Railroad Company* v. *Tompkins*, 58 S.Ct. 817, 304 U.S. 648, 82 L.Ed. 118 (1938) and *Guaranty Trust Company* v. *York*, 65 S.Ct. 1464, 326 U.S. 99, 89 L.Ed. 2079 (1945), a different result should not be reached by the Federal Courts than would have been reached in the state courts of the State of Texas, if this case had not been removed by the United States of America. While the lower courts have superficially recognized the controlling effect of state law, their decisions have expressly been based upon general dictum from a rather old and inapplicable decision by the Texas Commission of Appeals and they have failed to give effect to more recent, controlling decisions by the Supreme Court of Texas, bearing directly on the point here in question, as is demonstrated below.

Thus, this argument must turn itself to the consideration and determination of what is the applicable law of the State of Texas, as enunciated by its Supreme Court, insofar as the constitutionality of the above provisions is concerned.

For a full understanding of the question here before the Court, the historical background of Article

260-1, Vernon's Texas Civil Statutes, must be developed. In this statute, as originally enacted in 1945,[3] Section 1 (1) in substance defined an account or account receivable as an existing or future right to the payment of money due or to become due under an existing contract, not secured by chattel mortgage, conditional sales contract or other similar instruments, and which right to payment was not represented by a judgment, negotiable instrument, or other specified non-negotiable instruments not material hereto. Section 2 provided that anyone taking an assignment of an account receivable would file a notice of such assignment. Section 3 provided for the form of the notice and Section 4 provided the place of recordation.

Since assignments of construction contracts were not specifically mentioned in the 1945 act, in 1955 Article 260-1 was amended, as is material hereto,[4] to include such construction contracts but providing that the definition did not include money accruing to a contractor on any public or private construction contract where the contractor furnished a surety bond guaranteeing performance. While Sections 2 and 4 were also changed in minor respects, the changes are not material hereto and will not be noted. The 1955 amendment reflects the law of the State of Texas as to protection of assignments of accounts receivable as of the date of the 1957 amendment here challenged.

In 1957, Article 260-1 was again amended.[5] The caption to the 1957 amendment provided that it was:

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[3] Appendix, Page 12.
[4] Appendix, Page 17.
[5] Appendix, Page 21.

"An act relating to protected assignments of accounts receivable; amending subdivision (1) of Section 1 of Chapter 293, Acts of the Forty-ninth Legislature, as amended (Article 260-1, Vernon's Texas Civil Statutes) so as to change the definition of 'account' or 'account receivable' *by deleting provisions excluding sums accruing to a contractor;* and declaring an emergency. (Emphasis added)

Petitioner feels that it is manifest that the above caption would indicate to a person of ordinary intelligence reading same that any amendment of Article 260-1 would be confined to deleting the provisions specified in the caption pertaining to a contractor who had furnished a surety bond. However, in the body of the statute, and in Section 1 (1) thereof, which is the subdivision dealing only with definitions, the body of the amendatory act not only deleted the specified provisions, but attempted to require (a) that assignments of construction contracts identify the land upon which the improvements are to be erected, and; (b) that the assignment of the construction contract itself, rather than a notice of such assignment, be filed in that county where the land lies, rather than in the county of the assignor's residence or principal place of business as required in Section 4 of said Article 260-1. To the extent that the amendatory act of 1957 purports to require that an assignment of a construction contract identify the land where the construction is to be erected, and purports to change the manner and place of recordation, it is unconstitutional for the reason that notice of such added requirements was not given by its caption, which gave notice only that Article 260-1 was to be amended in a particular manner by deleting one certain requirement.

Since this constitutional question is to be de-

cided in accordance with Texas law, the next logical step would appear to be a consideration and determination of the applicable law as enunciated by the Supreme Court of Texas.

The landmark case in this connection by the Supreme Court of Texas is the case of *Arnold* v. *Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). Here, a statute relating to community property had been challenged, where the caption provided that the amending act concerned a provision that the wife could convey her separate real estate, bonds and stocks on court order, without the joinder by her husband, if he were insane or had permanently abandoned her. However, the body of the Statute went further, and changed the status of certain property from that of community property to that of the wife's separate property. The Supreme Court of Texas, in applying the effect of Article 3, Section 35 of the Texas Constitution stated at Page 803:

> "The caption is not content to state a purpose to amend certain statutes, but proceeds to specify the nature of the proposed amendment. Thus the caption declares that the amendment consists of a provision authorizing the wife, on order of the district court, to convey her separate real estate, bonds, and stocks without joinder by her husband, when he is insane or has permanently abandoned her. This language not only gives no notice of an intention to change the status of certain property from community property to the wife's separate property, but completely disguises any such intention. *A caption concealing the true purpose of a Statute, and stating an altogether distinct and foreign purpose, is necessarily deceptive, and cannot be sustained as complying with Section 35 of Article 3 of the Constitution.* Ward Cattle & Pasture

Co. vs. Carpenter, 109 Tex. 105, 200 S.W. 521." (Emphasis added).

The most analogous case by the Supreme Court of Texas, and the authority which Petitioner submits is controlling on the question here before the Court, is the case of *Gulf Insurance Company* v. *Jones*, 143 Tex. 424, 185 S.W. 2d 966 (1945) which involved a caption which provided that the act was:

> "An act providing for placing portions of certain special funds in the general revenue fund of the State of Texas and especially transferring a portion of the surplus from the Operator's and Chauffeur's License Fund from the general revenue fund of the State of Texas and declaring an emergency."

In the body of the statute, however, the Legislature, in addition to transferring the Operator's and Chauffeur's License Fund, also transferred some seventeen other funds into the general fund in a separate section. In holding that the act was void insofar as it attempted to transfer the seventeen additional funds because fair notice thereof was not given by the caption of the act, the Texas Supreme Court stated that Page 970:

> "We recognize the well-established rule that liberal construction will be indulged in order to hold that the title of an Act conforms to the requirements of the Constitution. 39 Tex. Jur. 95. But the provision of the Constitution requiring the title to express the subject of the Act cannot be entirely ignored. Cannon v. Hemphill, 7 Tex. 184, 208. *The rule of liberal construction will not be followed to the extent that it will relieve the legislature of the necessity of disclosing the real subject of the Act in the title thereof, nor will it be extended so as to hold Acts valid, the titles of which are deceptive or misleading as to the real content*

*of the Acts.* The purpose of Section 35 of Article III of the Texas Constitution is to require that the bill shall advise both the Legislature and the people of the nature of each particular bill, such purpose being stated in Consolidated Underwriters vs. Kirby Lumber Co., Tex. Com. App. 267 S.W. 703, 705 as follows: 'To advise the Legislature and the people of the nature of each particular bill, so as to prevent the insertion of obnoxious clauses which otherwise might be ingrafted on it and become the law and to obviate legislation through the combination upon a composite bill, of the votes of the proponents of different measures included in it, some of which would not pass upon their merits if separately considered.':

"Other authorities state the purpose of such a requirement as follows: 'The purpose of the constitutional requirement is to give notice through the title of the bill, not only to members of the legislature, but to the citizens at large, of the subject-matter of the projected law; and thereby to prevent the surreptitious passage of a law upon one subject under the guise of a title which expresses another'." Adams & Wickes v. San Angelo Water Works Co., 86 Tex. 485, 487, 25 S.W. 605, 606. "But the title must be such as to reasonably apprise the public of the interests that are or may be affected by the statute." Cooley, Constitutional Limitations (8th Ed.), Vol. 1, p. 300. See also Giddings v. City of San Antonio, 47 Tex. 548, 26 Am. Rep. 321.

"We are of the opinion that the language used in the title of the Act in question is misleading and that it is not sufficient to properly advise the Legislature and the public as to the subject of the Act."

It is to be noted that the District Court, in its opinion, cited, as its only authority for upholding

the constitutionality of the provisions here in question, the case of *Consolidated Underwriters v. Kirby Lumber Company*, 267 S.W. 703, 705, (Tex. Com. App., 1924), which generally states that Section 35, Article 3 of the Texas Constitution is to be interpreted liberally. However, this argument was rejected by the Supreme Court of Texas in the *James* Case, although the *Kirby Lumber Co.* Case was noted in a portion of the opinion in the *James* Case quoted above.

Further, it should be noted that in the Court below, the United States of America contended that the caption here in question sets forth two purposes; one stating that the act related generally to protect assignments of accounts receivable, and the second specifying the form of one particular amendment. The only argument advanced below by the Government in support of the constitutionality of the caption in question was that the provisions here in question were encompassed by the first general statement of purpose (that the act related to protected assignments of accounts receivable). In this connection it is to be observed that the *James* Case, the first portion of the caption stated generally that it was providing for placing portions of certain special funds in the general revenue fund of the State of Texas, but the Supreme Court of Texas held, in effect, that this general clause was restricted by the subsequent language relating to the transfer of the Operator's and Chauffeur's License Funds, and, therefore, the additional transfer of funds could not stand.

Since the *James* Case was decided in 1945, the possibility exists that the District Court and the Court of Appeals had some question as to whether or not this decision was still the controlling law in

Texas. If any such doubt existed, *a very recent case by the Supreme Court of Texas settles this question.* On November 20, 1963, some seven days before the opinion of the Court of Appeals in the instant case was handed down on November 27, 1963, the Supreme Court of Texas delivered its opinion in the case of *Harris County Fresh Water Supply District* v. *Carr.* 372 S.W. 2d 523 (Tex.Sup.Ct., 1963). This opinion, was, however, first published in the advance sheet of the Southwestern Reporter on the 31st day of December, 1963, after motion for rehearing had been overruled by the Court of Appeals in the instant case. A motion for leave to file a second motion for rehearing, calling the Court's attention to the *Carr* case, was forwarded to the Court of Appeals on January 16, 1964, and the Court of Appeals on March 11, 1964, granted leave to file same, but summarily overruled the petition in the same order without further opinion.

The *Carr* case involved the constitutionality of a statute, wherein the caption provided that the act was "An act providing that water control and improvement districts and underground water conservation districts may be created only according to the provisions of Section 59 of Article 16 of the Constitution; providing exemptions and declaring an emergency." In the body of the statute, the Legislature also attempted to prevent the creation of Fresh Water Supply Districts, in addition to Water Control and Improvement Districts and the Underground Water Improvement District, except as therein provided. The Court held that the statute was void insofar as it attempted to deal with the creation of Fresh Water Supply Districts because of want of notice in the caption. In arriving at its decision the Supreme Court of Texas cited with ap-

proval the *James* case, thereby erasing any doubt that the *James* case is the controlling law of the State of Texas insofar as the question here before the Court is concerned.

Also cited with approval by the Supreme Court of Texas in the *Carr* case was the case of *Adams* v. *San Angelo Water Works Company*, 86 Tex. 485, 25 S.W. 605 (1894). The caption in the *Adams* case stated that the act was "An act to amend an act to regulate the condemnation of property in cities and towns for the purpose of opening, widening or changing public streets or avenues or alleys or for water mains and sewers, approved March 28, 1883." The language following the word "amend" was literal repetition of the title of the original act. However, the body of the act also provided for the condemnation of land for reservoirs for waterworks, and the opinion held that the portion of the act so providing was unconstitutional because it was not included in the caption. In this connection, the Court stated at page 606:

> "We have not been furnished with a brief for appellees, but it has occurred to us that it may be contended on their behalf that so much of the title of the statute under consideration as repeats the caption of the original act was intended merely to describe it, and not to express the purpose of the amended law. It may be contended, in other words, that the title in question should be treated as if it had merely expressed the purpose to amend the law of March 28, 1883. But it may be doubted, in the first place, whether, under the requirement of the constitution, such a title would have been sufficient to embrace a subject not mentioned in the former law; and, in the second, we think that the title of the latter act should be construed not only as pointing out

> the law it was intended to amend, but to state the subject of the amendatory act in the same terms which were employed in the title of the act amended. This construction accords best with the spirit of the provision of the construction. The other construction, we think, would allow the legislature to do by indirection what it was prohibited from doing directly, and enable it to incorporate in an amendatory statute a subject-matter which was not expressed either in that or in the statute which was amended. We are, therefore, of the opinion that the statute under consideration is void insofar as it attempts to authorize the condemnation of property for reservoirs and standpipes."

Perhaps Petitioner's position herein is best summarized by a statement in the case of *Landrum* v. *Centennial Rural High School District No.* 2, 134 S.W.2d 353 (Tex.Civ.App., Austin, 1939) err. dismissed, judgment correct. There the Court stated on Page 356:

> "No ruling is better established than the one where a titles or caption of an act specified the particular field of the amendment, and that it is to cover or state a particular purpose to make a change in a prior statute, the amendment is limited to the making of the specific change designated in its title, and precludes any additional, contrary, or different amendment than that stated in the title."

In the interest of brevity, this Petition will not be burdened with quotations from additional authorities. A summary of the existing law in Texas in this regard may be found in 39 Tex.Jur. (Statutes) Sections 47 & 48, wherein additional authorities are cited.

In view of the foregoing authorities, it appears

manifest that the caption of the 1957 amendment to Article 260-1, Vernon's Texas Civil Statutes, expressed, as the purpose of the amendment of said statute, simply the deletion of the provisions excluding sums accruing to a contractor who had furnished a surety bond. The language used indicated to the reader of average intelligence that this would be the only change made. As is indicated in the *James* case, the Legislature and the people of Texas were entitled to rely upon the caption disclosing, at least in general terms, what provisions were to be contained in the amendment, and were particularly entitled to rely on the fact that they would not be misled if they read only the caption without reading the complete body of the amendment. Since the caption here in question was clearly misleading, insofar as the body of the statute attempted to require that the assignment describe the land where the improvements were to be erected, and to require that the assignment itself be recorded in the county where the land lies, such provisions must be excluded from any consideration of the statute as being invalid.

Hence, the question of whether or not Petitioner's assignment was perfected, and not inchoate, must be determined in accorance with the remaining and valid provisions of Article 260-1. It is to be noted that prior to 1957, assignments of construction contracts wherein the contractor had furnished a surety bond were excluded from the scope of such article. Thus, by implication, all construction contracts not requiring a performance bond would be included within the purview of the prior statute. Since the subcontract here in question (R. 98), contains no provision for the subcontractors to post a bond for performance, obviously this is the type

of assignment which was encompassed by the provisions of the prior law. Regardless of whether the 1957 amendment was effective to delete the exclusion of the prior law as to contractors furnishing a bond, the Petitioner's assignment would be included in the statutory definition in either event.

Section 3 of said Article requires that a notice of such assignment be filed, containing the name and mailing address and residence, principal office or place of business of both assignor and assignee, a statement that the assignor has assigned or intends to assign one or more assignments and a statement of the period of time for which said notice is to be effective. The trial court found that a notice containing these requirements was filed by Petitioner (R. 156; 159), and that such notice was filed in Hidalgo County, Texas. (R. 157; 159) The undisputed evidence reflects that the principal place of business of the Paul Owens Lathing Company was in McAllen, in Hidalgo County, Texas, at the time of the assignment, and that this address was reflected by Petitioner's account records. (R. 18-19).

Therefore, since Petitioner's assignment was dated May 16, 1960, and was filed for record during the year 1960, and since no tax lien was filed by the Government prior to August of 1961, (R. 142) it would appear beyond dispute that Petitioner's assignment was perfected, and not inchoate, prior to the time that the Government lien arose, and therefore that Petitioner's assignment is entitled to priority. Since even the District Court's opinion, approved by the Court of Appeals, assumes that Petitioner would be entitled to priority if it had properly recorded a correct assignment, citation of authorities to such effect are not here deemed necessary.

If, however, in the alternative, it should be determined that construction contracts do not come within the purview of the *constitutional* provisions of Article 260-1, Vernon's Civil Statutes, in accordance with the foregoing discussion, then it is patent from the emergency clauses to said Article 260-1 and its amendments that there is not valid law in Texas under which an assignment of the nature here in question can be recorded. The prevailing law would appear to be that if a state statute does not provide for recordation of the assignment here in question, then it is unnecessary for such assignment to be recorded in order for it to became perfected as against a Federal tax lien. An annotation citing the various cases in point, and arriving at this conclusion, may be found in 2 L.Ed. 2nd, Page 1823.

If any detail as to this rule is not clarified by such annotation, then this Court's attention is invited to the case of *United States* v. *Crest Finance Company*, 368 U.S. 347, 82 S.Ct. 384, 7 L.Ed. 2d 242 (1961). In the lower courts in the *Crest* case, the Government had successfully urged a broad and sweeping construction of the case of *United States* v. *R. F. Ball Construction Co.*, 355 U.S. 587, 78 S.Ct. 442, 2 L.Ed. 2d 510, and maintained that the requirements necessary for a lien or assignment to be perfected, and not inchoate, under the U.S. Supreme Court's said decision, are strict and rigid. However, when faced with the proposition of arguing such an interpretation before the Supreme Court itself, the Government decided to "abandon ship" on such contention, and conceded that the lien there in question was perfected unless the question of recordation made it ineffective. This court, in a per curiam opinion, expressly agreed with the concession, and

remanded to the 7th Circuit Court for the development o nthe recordation question; recognizing, in effect, that if the State statute did not require the lien to be recorded, then no recordation was necessary in order for the lien to be perfected, and not inchoate. The 7th Circuit, in a decision in 302 F. 2d 568 (CCA, 7th Cir., 1962), decided that the state statute did not require recordation in that particular case, and therefore held that the Government's tax lien was inferior to the prior unrecorded lien.

Therefore, it is respectfully submitted that if this court will consider the valid and constitutional provisions of Article 260-1, Vernon's Texas Statutes, and, in accordance with the established precedence of the Texas Supreme Court, will ignore the unconstitutional and invalid portions, there can be no question in this case but that Petitioner's assignment was perfected; and Petitioner was entitled to receive the fund herein question as against the subsequently arising claim of the United States of America, in view of the fact that the amount of Petitioner's claim was in excess of the amount interpled.

## Conclusion and Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant its Writ of Certiorari to correct the error of the Court of Appeals in deciding an important state question in a way which is in conflict with applicable state law; and that upon hearing hereof, this Court reverse the judgments of the Court of Appeals and

District Court and render judgment in favor of Petitioner, awarding Petitioner the funds here interpled.

Respectfully submitted,

JACKSON LITTLETON
RALPH ALEXANDER
Edinburg, Texas
Jackson Littleton
*Attorneys for Petitioner*

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Edinburg, Texas

*Of Counsel*

**Certificate**

I, Jackson Littleton, do hereby certify that a copy of the above and foregoing Petition was mailed the attorneys for the Respondent as they appear of record, postage prepaid, on this the 21st day of March, 1964.

Jackson Littleton
JACKSON LITTLETON

# APPENDIX

## In The
## DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

## No. 1466

W. B. UHLHORN, d/b/a
W. B. UHLHORN CONSTRUCTION CO.

vs.

PAUL OWENS, ET AL.

Orrin W. Johnson, of Harlingen, Texas; for Plaintiff.

Honorable Woodrow Seals, U.S. Attorney, of Houston, Texas, Homer M. Lopez, Assistant U.S. Attorney, of Brownsville, Texas, and Lorence L. Bravenec, of Department of Justice, Washington, D.C.; for Defendant and Plaintiff in Intervention, United States of America.

Kelly, Looney, McLean & Littleton (Ralph L. Alexander), of Edinburg Texas; for Defendant Security State Bank of Pharr, Texas.

Honorable Will Wilson, Attorney General of Texas, and Sam Lane, Assistant Attorney General, of Austin, Texas; for Intervenor The State of Texas.

W. L. Lemen, Jr., of San Juan, Texas; for Defendant Central Valley Ready-Mix Company.

19 NOVEMBER 1962

This case was originally filed in State District Court by W. B. Uhlhorn d/b/a W. B. Uhlhorn Construction Co., as a bill of interpleader against Paul

Owens and Jack Dooley, individually and d/b/a Valley Lathing & Plastering Company, Security State Bank of Pharr, Central Valley Ready-Mix Company, C. & G. Lumber Company, Damacio Reyna, Rolando Munoz, L. E. Travis & Sons, Inc., and the United States of America as Defendants. The United States of America removed the case to this Court.

After removal, the Government, not satisfied with the mere position of a defendant in the interpleader action, filed an intervention pursuant to Sections 7401 and 7403 of the Internal Revenue Code of 1954.

Uhlhorn Construction Co. had the primary contract to build the Falcon Housing Project at Falcon Heights, Texas, with the International Boundary & Water Commission. The work to be performed under said contract was for a housing project to be used in conjunction with Falcon Dam.

Uhlhorn then entered into a written subcontract with the Defendant Paul Owens, d/b/a Paul Owens Lathing Company, on or about April 27, 1960, and the obligation of the subcontract was thereafter assumed by and transferred to the Defendants Owens and Dooley, d/b/a Valley Lathing & Plastering Company, who proceeded to perform it. On May 14, 1960, the subcontractor assigned all the proceeds due the said subcontractor under and by reason of said contract to the Defendant Security State Bank of Pharr, Texas, and authorized Uhlhorn to make checks payable jointly to said subcontractor and said bank. The bank, under said assignment, made advances to the subcontractor, and the amount still owed on said advances, by the subcontractor to the bank, is in excess of the amount still due them under this contract.

The prime contractor and interpleader, Uhlhorn, towards the close of not only the subcontract but the prime contract, even though they had an affidavit signed by Jack Dooley in behalf of Valley Lathing & Plastering Company that all bills had been paid, became aware of several claims, and they have tendered into court the sum of $4,893.45 as the balance retained under the subcontract, and has asked the Court to determine the rightful claimants to said amount.

C & G Lumber Company and L. E. Travis & Sons, Inc., have disclaimed. Reyna and Munoz have never appeared to press their claims. The State of Texas has intervened, claiming a lien for delinquent unemployment taxes against the subcontractors in the sum of $1,028.34.

Prior to the issuing of the affidavit mentioned above by Dooley, according to their last estimate submitted to Uhlhorn, Uhlhorn owed them on the contract the sum of $4,977.00, and on the oral representation of the subcontractor that all bills were paid, Uhlhorn had prepared a check, dated May 10, 1961, in said amount. They held the check, however, until May 18th, when the Defendant Dooley came and made the verbal assertion that the subcontract had been fully completed, that all bills for labor and materials had been paid and satisfied, and that he was, therefore, entitled to said check for $4,977.00. The check in that amount, made payable jointly to the subcontractor and to the bank, was then delivered.

Shortly after delivering said check, Uhlhorn was advised by the International Boundary & Water Commission that there was in fact an outstanding unpaid bill for materials due by the subcontractor to G & G Lumber Company, and Uhlhorn proceeded

to stop payment on the check for $4,977.00.

The bank, in turn, in this case has filed a cross-action against Uhlhorn, claiming that by relying on the issuance of the check for $4,977.00, it released all the notes that the subcontractor had with them, with the exception of one. They allege in their cross-action that they were misled by Uhlhorn, through its agents, that the check for $4,977.00 was good, and that Uhlhorn is now precluded and estopped to stop payment on said check or refuse to pay said check.

The Court, after a hearing, has ruled adversely on the cross-action of the bank against Uhlhorn, finding that Uhlhorn was within his rights in stopping payment on the check and could not be estopped or precluded from stopping payment on the same.

Uhlhorn, after stopping payment on said check of $4,977.00, on the advice of the subcontractor and with its consent, paid G & G Lumber Company the sum of $439.30, resulting in the amount which he has tendered into Court.

The mechanics' liens of Valley Ready-Mix Company, Damacio Reyna and Rolando Munoz, even if treated as mechanics' liens, have not been perfected and reduced to judgment, and therefore are inchoate and not superior to the claim of the Government, and since the amount involved is less than that claimed by the Government, they are out of the case as far as the funds in court are concerned. The same holds true for the claim of the State of Texas; and as far as the money in court is concerned, the State of Texas does not have any right to the same.

That leaves for disposal the controversy between Security State Bank of Pharr, Texas, and the Government, as to the priority of their liens.

Security State Bank has taken the position that its assignment from the subcontractor was a protected assignment and was a choate interest; that its assignment was prior in time to the filing of the Governmnt's tax liens which are for a greater amount than the amount tendered into court. The amount due by the subcontractor to the Security State Bank is also in excess of the amount tendered. So a ruling on the priority of the liens as between the Bank and the Government will resolve the question of who is entitled to the money now in court.

There is no question that in order for the assignment held by the bank to be a valid assignmnt, it had to be taken under Article 260-1, Vernon's Texas Civil Statutes. This was the same statute involved in the case of *U.S. v. R. F. Ball Construction Co., Inc., et al,* which is to be found in 140 F. Supp. 60, 239 F. 2d 384, and 355 U.S. 587, as it existed before the 1957 amendment to the same.

The pertinent part of said statute is Section 1 (1) which reads as follows:

> Section 1 (1) "Account" or "account receivable" means an existing or future right to the payment of money presently due, or to become due (a) under an existing contract or under a future contract entered into during the effective period of the notice of assignment hereinafter provided for; (b) which right to payment is not secured by a chattel mortgage, a conditional sale contract, or other instrument which may be filed for record in a public office of this or another state or of the United States and which instrument was given at or before the time the account was assigned and reserves the title to, or creates a lien upon, goods, the sale of which gave rise to the account; and (c) which right to payment is not represented by (A) a

judgment, (B), a negotiable instrument, or (C) a non-negotiable instrument which so represents the obligation that an assignee who takes possession of it takes rights superior to those of a prior assignee of the obligation who did not take possession of the instrument; and (d) the assignment of which right is not subject to special statutory provisions of the state or of the Federal Government relative to the rights of creditors of the assignor or to successive assignees from the assignor; *"account" or "account receivable" shall not include any sums of money accruing to a contractor for labor performed or material furnished on any public or private construction contract unless the assignment properly describes the land upon which the improvements are to be constructed and such assignment filed in the office of the County Clerk of the county wherein the land lies; which assignment shall not be effective prior to such filing.* As amended Acts 1955, 54th Leg., p.822, ch.305, § 1; Acts 1957, 55th Leg., p.818, ch.348, § 1. — (Emphasis supplied.)

As reflected in the above quotation, the underlined portion of Article 260-1 was added by the 55th Legislature in 1957, Acts 1957, 55th Leg., p.818, ch.348, sec.1. As the Act was originally enacted, the underscored portion of said Section 1 (1) was omitted enfirely. Acts 1945, 49th Leg., p.463, ch.293. In 1955, this Section was amended to add to the original text of Section 1, the folowing:

"'account' or 'account receivable', however, shall not include any sums of money accruing to a contractor for labor and/or material performed and/or furnished on any public or private construction contract where such assignor (contractor) has furnished a surety bond guaranteeing the performance of the contract and/or the payment of labor or

other material bills incurred thereon." Acts 1955, 54th Leg., p.822, ch.305.

Insofar as matters pertinent to this case are concerned, this was the wording of this Section at the time of the amendatory Act of 1957.

In 1957 the 55th Legislature purportedly enacted House Bill No. 698, Acts of 1957, 55th Leg., p.818, ch.348, sec.1. Although said bill, in Section 1 thereof, purportedly enacted, as an amendatory act, Section 1 (1) of Article 260-1 as quoted above, the caption given said Act was as follows:

> "An Act relating to protected assignments of accounts receivable; amending subdivision (1) of Section 1 of Chapter 293, Acts of the Forty-Ninth Legislature, as amended (Article 260-1, Vernon's Texas Civil Statutes), so as to change the definition of 'account' or 'account receivable' by deleting provisions excluding sums accruing to a contractor who has furnished a surety bond; and declaring an emergency."

The emergency clause contained in said Act, as Section 2 thereof, reads as follows:

> "Sec. 2. The fact that the present definition of 'account' or 'account receivable' prevents contractors from obtaining interim financing by pledging accounts receivable, resulting in serious impediment to the financing of construction projects, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted."

If the Assignment Act, as it existed at the time of

the assignment from the subcontractor to the bank, is followed, the assignment held by the Security State Bank was not perfected because the assignment failed to describe the land on which the subcontractor was building, and the same was not recorded in the county where the land lies.

The bank contends that the amendment to said Act in 1957 was unconstitutional because the caption of the Act did not authorize the amendment as finally passed, in violation of Article III, Section 35, of the Texas Constitution. It claims that since there is a variance between the title (or caption) and the subject of the Act, the same cannot be given validity because of the constitutional provision that the caption (or title) shall sufficiently give notice to members of the Legislature and the public of the provisions of the Act.

With this contention, this Court cannot agree. There is no question that the purpose of the amendment was to make interim financing for contractors available from lending institutions. The amendment makes this possible, but provides that the assignment must describe the land on which contracts are being performed, and the assignment must describe the land on which contracts are being performed, and the assignment must be recorded in the county where the land lies, before it can be effective. Section 35, Article III, of the Texas Constitution is to be interpreted liberally, not strictly, in favor of the validity of legislation. *Consolidated Underwriters* v. *Kirby Lumber Co.*, 267 S.W. 703, 705 (Tex.Com.App. 1924).

A liberal interpretation of the caption of the amendment can lead this Court to no conclusion other than that the 1957 amendment of Article 260-1 is valid and constitutional. Article 260-1, as now

written, would, in my opinion, give the bank in this case the status of a mortgagee under Section 6323, Title 26, U.S.C.A. However, the Security State Bank failed to describe the land in its assignment, and failed to record the assignment in the county where the land lies, and its assignment, therefore, is unperfected, imperfect and inchoate.

The Supreme Court has imposed a perfected lien standard on lien interests that are recognized under Section 6323. *U.S.* v. *White Bear Brewing Co.*, 350 U.S. 1010, 76 S.Ct. 646, 100 L.Ed. 871; *U.S.* v. *Colotta*, 350 U.S. 808, 76 S.Ct. 82, 100 L.Ed. 725; *U.S.* v. *City of New Britain, Conn.*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520; *U.S.* v. *Security Trust & Savings Bank of San Diego*, 340 U.S. 47,71 St.Ct. 111, 95 L.Ed. 53.

Although the assignment of the bank, if good, was prior to the liens of the Government, I find that the assignment of the bank was inchoate and unperfected. Therefore, the provisions of Section 6323, Title 26, U.S.C.A., do not apply, and the liens of the Government must be given priority.

The only question remaining is the question of attorney's fees to be taxed as costs in behalf of the Interpleader Uhlhorn. At the conclusion of the hearing in this case, the Court found that Uhlhorn was due a certain sum as attorney's fees for having had to file his interpleader; but under the authority of *U.S.* v. *Liverpool & London Ins. Co.*, 348 U.S. 215, 75 S. Ct. 247, 99 L.Ed. 268, when the Government prevails, no attorney's fees can be taxed as costs against it, so the claim of the Interpleader Uhlhorn for attorney's fees is denied.

The Government may have its deficiency judgment as against the Defendants Owens and Dooley

for the balance of its liens not covered by the amount in court.

Clerk will notify counsel, and counsel for the Government will prepare a judgment to be entered.

REYNALDO G. GARZA
JUDGE.

# APPENDIX

## In The
## UNITED STATES COURT OF APPEALS
## FOR THE FIFTH CIRCUIT

## No. 20681

SECURITY STATE BANK OF PHARR, TEXAS,
APPELLANT,

VERSUS

W. B. UHLHORN, D/B/A UHLHORN CONSTRUCTION COMPANY, ET AL.,
APPELLEES.

*Appeal from the United State District Court for the Southern District of Texas.*

(November 27, 1963.)

Before TUTTLE, Chief Judge, BROWN and GEWIN, Circuit Judges.

PER CURIAM: We have carefully considered the contention of the appellant that House Bill No. 698, Acts of 1957, 55th Leg., page 818, chapter 348, of the State of Texas, requiring the assignment of certain contracts to be recorded in a specific manner, is unconstitutional. The relevant facts and the discussion of the constitutional issue are fully set out in the judgment of the district court in 211 F.Supp. 798. We conclude that the determination of the trial court as set forth in its opinion should be affirmed:

Approving the decision, as we do, we AFFIRM the judgment on the reasoning contained in the opinion of the trial court.

# APPENDIX

**Article 260-1, Vernon's Texas Civil Statutes, as enacted in 1945, Acts of the Forty-ninth Legislature of the State of Texas, Page 463, Chapter 293.**

ACCOUNTS RECEIVABLE — ASSIGNMENTS
CHAPTER 293
S.B. No. 180

An Act relating to protected assignments of accounts receivable; providing a form of public notice for such assignments; providing for the filing of notices relating thereto; providing for the filing cancellation, satisfaction, and release of such notice, and providing the duties and fees of the County Clerk in connection therewith; providing that the recording of such notices shall constitute constructive notice; providing for protection of the rights of debtors, and of assignees; defining terms used therein, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Definitions: In this Act, unless the context otherwise requires:

(1) "Account" or "account receivable" means an existing or future right to the payment of money presently due, or to become due (a) under an existing contract; (b) which right to payment is not secured by a chattel mortgage, a conditional sale contract, or other instrument which may be filed for record in a public office of this or another state or of the United States and which instrument was given at or before the time the account was assigned

and reserves the title to, or creates a lien upon, goods, the sale of which gave rise to the account; and (c) which right to payment is not represented by (A) a judgment, (B) a negotiable instrument, or (C) a non-negotiable instrument which so represents the obligation that an assignee who takes possession of it takes rights superior to those of a prior assignee of the obligation who did not take possession of the instrument; and (d) the assignment of which right is not subject to special statutory provisions of the state or of the Federal Government relative to the rights of creditors of the assignor or to successive assignees from the assignor.

(2) "Assignee", "assignment", "assignor", and "debtor" are limited respectively to an assignee, assignment, assignor of, and debtor on an account receivable.

(3) "Contract" includes express-contracts, written or oral, and implied contracts, such as an obligation to pay for goods received or services rendered without an express contract.

(4) "Assignment" means any transfer of an account, other than by operation of law, including but not limited to a transfer as security, the creation by agreement of a lien on an account, and sales of accounts.

Sec. 2. The assignment of any account or accounts may be protected by the execution and delivery by the assignor to the assignee of an instrument or instruments in writing, assigning such account or accounts and describing the account or accounts assigned with sufficient particularity to identify the same, and by the filing for record the "Notice of Assignment", as hereinafter provided for.

Sec. 3. Whenever any person, firm or corporation assigns within this state by instrument in writ-

ing all or any one or more of his accounts receivable, there may be filed for record a "Notice of Assignment", signed by the assignor and acknowledged or witnessed as provided in the case of chattel mortgages which shall contain:

(a) The name and mailing address and the residence, principal office, or place of business, within this state of both the assignor and assignee; or if either the assignor or the assignee has no mailing address within the state, the mailing address outside the state.

(b) A statement that the assignor has assigned or intends to assign one or more accounts to the named assignee.

(c) A statement of the period of time for which such notice is to be effective.

Sec. 4. The place for filing the notice of assignment shall be the office of the County Clerk of the County of the assignor's residence within this state; or if not a resident of this state, the office of the County Clerk of the County wherein the principal office of the assignor is maintained; or, if neither a resident of this state nor maintaining a principal office within this state, in the office of the County Clerk of Travis County, Texas. Such notice of assignment shall be effective for a definite period of time to be stated therein, not to exceed a period of three years. The County Clerk shall on request, for a charge of Fifty (50c) Cents, issue a certificate with respect to any specified person either stating that the specified person is not a filing assignor, or if the specified person is a filing assignor, stating the contents of the filed notice of assignment.

Sec. 5. Upon the filing for record of any notice of assignment the County Clerk shall receive, file and index the same, as in the case of chattel mort-

gages, and shall preserve the same among the chattel mortgages in his office for each notice of assignment which shall be filed, and shall receive a fee of Twenty-five (25c) Cents. Satisfaction, cancellation or relase, signed by the assignee, or any such notice of assignment recorded in the office of the County Clerk may be entered on the record book in such office in which the notice of assignment is entered, as in the case of chattel mortgages, and for each such entry the County Clerk shall receive a fee of Twenty-five (25c) Cents.

Sec. 6. Whenever any person, firm or corporation shall in good faith take a protected assignment of any account or accounts, which shall not have been satisfied, cancelled or released by the assignor, all creditor sof, and all subsequent assignees, purchasers and transferees of or from the assignor shall be conclusively deemed to have received notice of such assignment, dating from the time of the filing for record of the notice of assignment hereinabove provided; and after such filing for record, no purchaser from the assignor, no creditor of any kind of the assignor, and no prior or subsequent assignee or transferee of the assignor, holding an assignment not protected, or holding an assignment under a notice of assignment subsequently filed for record, shall in any event have, or be deemed to have acquired, any right in the account or accounts so assigned or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights therein of the assignee named in such prior protected assignment.

Sec. 7. Whenever any person, firm or corporation shall take a protected assignment of any account or accounts receivable, and the debtor thereafter acting without written notice of such assign-

ment shall in good faith pay all or part of such account to the assignor or to any creditor, purchaser, assignee, or transferee, not holding a prior protected assignment, such payment shall be an acquittance to the debtor to the extent thereof, and such assignor, creditor, purchaser, assignee or transferee receiving such payment shall be a trustee of any sums so paid and shall be accountable and liable to the holder of the protected assignment therefor.

Sec. 8. The right or lien of the assignee upon any balance remaining owing or any assigned account receivable shall not be invalidated, irrespective of whether the assignee shall have consented to or acquiesced in the acts of the assignor, if merchandise sold, or any part thereof, is returned to or recovered by the assignor from the person owing the account receivable and he thereafter deals with it as his own property, or if the assignor grants credits, allowances or adjustments to the person owing an account receivable.

Sec. 9. The fact that the present law concerning the assigning of accounts is confused and is impairing the flow of credit in its normal channels, thus endangering the orderly procedure of business, and the fact that under this confusion and uncertainty of law, banks and other loaning agencies cannot make necessary loans, create an emergency and an imperative public necessity that the Constitutional Rule requiring a bill to be read on three several days in each House be suspended, and the same is hereby suspended, and that this Act shall take effect and be in force from and after the date of its passage and approval, and it is so enacted.

Passed the Senate, April 30, 1945: Yeas 28, Nays 0; passed the House, May 22, 1945: Yeas 127, Nays 1.

Approved June 1, 1945.

Effective June 1, 1945.

# APPENDIX

**1955 Amendment to Article 260-1, Vernon's Texas Civil Statutes, as enacted by the Fifty-fourth Legislature of the State of Texas, Page 822, Chapter 302.**

ASSIGNMENTS OF ACCOUNTS RECEIVABLE
CHAPTER 305
H. B. No. 653

An Act to amend Section 1; subdivision (1) and Sections 2 and 4 of Acts of the Forty-ninth Legislature, 1945, Chapter 293, at page 463, relating to protected Assignments of Accounts Receivable regardless of whether such accounts are in existence at the time notice of assignment is filed; defining "Account" or "Account Receivable"; providing for the term and filing of notices relating thereto; providing for the filing, cancellation, satisfaction, and release of such notice; and providing the duties and fees of the County Clerk in connection therewith; providing that the recording of such notices shall constitute constructive notice regardless of whether the contract out of which the accounts arose was in the contemplation of the assignor and assignee when the notice of assignment was executed; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. That Section 1, subdivision (1) and Sections 2 and 4 of the Acts of the Forty-ninth Legislature, 1945, Chapter 293, at page 463; be and the same are hereby amended to read as follows:

"Section 1. Definitions: In this Act, unless the

context otherwise requires:

"(1) 'Account' or 'Account Receivable' means an existing or future right to the payment of money presently due, or to become due (a) under an existing contract or under a future contract entered into during the effective period of the notice of assignment hereinafter provided for; (b) which right to payment is not secured by a chattel mortgage, a conditional sale contract, or other instrument which may be filed for record in a public office of this or another state or of the United States and which instrument was given at or before the time the account was assigned and reserves the title to, or creates a lien upon, goods, the sale of which gave rise to the account; and (c) which right to payment is not represented by (A) a judgment; (B) a negotiable instrument, or (C) a non-negotiable instrument which so represents the obligation that an assignee who takes possession of it takes rights superior to those of a prior assignee of the obligation who did not take possession of the instrument; and (d) the assignment of which right is not subject to special statutory provisions of the state or of the Federal Government relative to the rights of creditors of the assignor or to successive assignees from the assignor. 'Account' or 'account receivable' however shall not include any sums of money accruing to a contractor for labor and/or material performed and/or furnished on any public or private construction contract where such assignor (contractor) has furnished a surety bond guaranteeing the performance of the contract and/or the payment of labor and/or material bills incurred thereon.

"Sec. 2. The assignment of any existing or future account or accounts may be protected by the execution and delivery by the assignor to the as-

signee of an instrument or instruments in writing, assigning such account or accounts and describing the account or accounts assigned with sufficient particularlity to identify the same, and by the filing for record the 'Notice of Assignment' as hereinafter provided for."

"Sec. 4. The place for filing the notice of assignment shall be the office of the County Clerk of the county of the assignor's residence within this state; or if not a resident of this state, the office of the County Clerk of the county wherein the principal office of the assignor is maintained; or, if neither a resident of this state nor maintaining a principal office within this state, in the office of the County Clerk of Travis County, Texas. Such notice of assignment shall be effective for a definite period of time to be stated therein, not to exceed a period of three (3) years, and such notice shall protect the assignment of accounts which arise during such effective period and which originate out of existing or future contracts, and are assigned by assignor to assignee at any time during such three (3) year period regardless of whether such account was in the contemplation of the assignor and assignee when such notice was executed. The County Clerk shall on request, for a charge of Fifty Cents (50c), issue a certificate with respect to any specified person either stating that the specified person is not a filing assignor, or if the specified person is a filing assignor, stating the contents of the filed notice of assignment."

Sec. 2. The fact that the present law concerning the assigning of accounts is confused and is impairing the flow of credit in its normal channels, thus endangering the orderly procedure of business, and the fact that under this confusion and uncertainty

of law, banks and other loaning agencies cannot make necessary loans, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the same is hereby suspended, and that this Act shall take effect and be in force from and after the date of its passage and approval, and it is so enacted.

Passed the House, April 5, 1955: Yea 142, Nays 3; passed the Senate, May 4, 1955: Yeas 29, Nays 0.

Approved May 21, 1955.

Effective May 21, 1955.

# APPENDIX

**1957 Amendment to Article 260-1, Vernon's Texas Civil Statutes, as enacted by the Fifty-fifth Legislature of the State of Texas, Page 818, Chapter 348.**

PROTECTED ASSIGNMENTS OF ACCOUNTS RECEIVABLE

CHAPTER 348

H. B. No. 698

An Act relating to protected assignments of accounts receivable; amending subdivision (1) of Section 1 of Chapter 293, Acts of the Forty-ninth Legislature, as amended (Article 260-1, Vernon's Texas Civil Statutes), so as to change the definition of "account" or "account receivable" by deleting provisions excluding sums accruing to a contractor who has furnished a surety bond; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Subdivision (1) of Section 1 of Chapter 293, Acts of the Forty-ninth Legislature, as amended by Chapter 305, Acts of the Fifty-fourth Legislature (codified under Article 260-1 of Vernon's Texas Civil Statutes) is hereby amended to read as follows:

"(1) 'Account' or 'account receivable' means an existing or future right to the payment of money presently due, or to become due (a) under an existing contract or under a future contract entered into during the effective period of the notice of assignment hereinafter provided for; (b) which right to payment is not secured by a chattel mortgage, a

conditional sale contract, or other instrument which may be filed for record in a public office of this or another state or of the United States and which instrument was given at or before the time the account was assigned and reserves the title to, or creates a lien upon, goods, the sale of which gave rise to the account; and (c) which right to payment is not represented by (A) a judgment, (B) a negotiable instrument, or (C) a non-negotiable instrument which so represents the obligation that an assignee who takes possession of it takes rights superior to those of a prior assignee of the obligation who did not take possession of the instrument; and (d) the assignment of which right is not subject to special statutory provisions of the state or of the Federal Government relative to the rights of creditors of the assignor or to successive assignees from the assignor; 'account' or 'account receivable' shall not include any sums of money accruing to a contractor for labor performed or material furnished on any public or private construction contract unless the assignment properly describes the land upon which the improvements are to be constructed and such assignment filed in the office of the County Clerk of the county wherein the land lies; which assignment shall not be effective prior to such filing:"

Sec. 2. The fact that the present definition of "account" or "account receivable" prevents contractors from obtaining interim financing by pledging accounts receivable, resulting in serious impediment to the financing of construction projects, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and this Rule is hereby suspended, and

that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the House, April 26, 1957: Yeas 121, Nays 0; passed the Senate, May 22, 1957, by a viva-voce vote.

Approved May 31, 1957.

Effective 90 days after May 23, 1957, date of adjournment.

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 946

SECURITY STATE BANK OF PHARR, TEXAS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves the validity under the Texas constitution of a Texas statute requiring that assignments of accounts receivable arising out of a construction contract describe the land on which the work is being done and be recorded in the county where the land lies.[1]

[1] 1A Texas Vernon's Civil Statutes Annotated:

"Art. 260-1. *Accounts and accounts receivable; notices; records*—

DEFINITIONS

"Section 1. In this Act, unless the context otherwise requires:

"(1) 'Account' or 'account receivable' means an existing or future right to the payment of money presently due, or to become due * * * the assignor: 'account' or 'account receivable' shall not include any sums of money accruing to a contractor for labor performed or material furnished on any public or private construction contract *unless the assignment properly*

The petitioner is a Texas bank which failed to record an assignment of a balance due on a construction contract given as security for its loan to a subcontractor. Its claim was therefore subordinated to a subsequent federal tax lien, in an interpleader suit (removed to the Federal District Court for the Southern District of Texas) to determine the right to the balance. To avoid the effect of its inadvertence, the petitioner contended that the recordation statute was unconstitutional in that the title of the enacted bill did not declare the subject of the bill as required by the Texas constitution.[2] The district court rejected this contention (Pet. App. 1–10), and its decision was affirmed *per curiam* by the Court of Appeals for the Fifth Circuit (Pet. App. 11). The decision below is plainly correct.

In 1945 the Texas legislature set forth recording requirements for assignments of accounts receivable.[3]

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*describes the land upon which the improvements are to be constructed and such assignment filed in the office of the County Clerk of the county wherein the land lies;* which assignment shall not be effective prior to such filing." [Emphasis supplied.]

* * * * *

[2] Constitution of the State of Texas (1876), 1 Vernon's Texas Constitution, Art. 3:

"SEC. 35. SUBJECTS AND TITLES OF BILLS

"No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed."

[3] Acts 1945, 49th Leg., p. 463, c. 293; Pet. App. 12–16.

In 1955 it passed an amendment excepting from the protection of the earlier statute assignments of receivables under a construction contract where performance was guaranteed by a surety.[4] As a result of that amendment, construction contractors were unable to obtain interim financing, creating a condition requiring immediate remedial legislation. Hence, in 1957, another amendment was adopted abolishing the exception made in the 1955 bill and affording protection to all assignments of accounts receivable under a construction contract, *provided* that the assignment described the property on which the improvements were being made and was recorded in the county in which the property lay.[5]

The title of the 1957 amendment was—

> An Act relating to *protected assignments of accounts receivable;* amending subdivision (1) of Section 1 of Chapter 293, Acts of the Forty-ninth Legislature, as amended (Article 260–1, Vernon's Texas Civil Statutes), so as to change the definition of "account" or "account receivable" by deleting provisions excluding sums accruing to a contractor who has furnished a surety bond; and declaring an emergency. [Emphasis added.]

That title gave ample notice of the bill's provisions for the protection of assignments of accounts receivable arising out of construction contracts, and is well within the liberal construction of Article 3, Section 35 of the Texas constitution as announced by the Texas courts. *Central Education Agency* v. *Inde-*

[4] Acts 1955, 54th Leg., p. 822, c. 302, Sec. 1; Pet. App. 17–20.
[5] Acts 1957, 55th Leg., p. 818, c. 348, Sec. 1; Pet. App. 21–23.

*pendent School District of City of El Paso,* 254 S.W. 2d 357, 361–362 (Tex. Sup. Ct.), rehearing denied, February 11, 1953; *Texas Liquor Control Board* v. *Warfield,* 111 S.W. 2d 862, 864 (Tex. Civ. App.); *Consolidated Underwriters* v. *Kirby Lumber Co.,* 267 S.W. 703, 705 (Tex. Com. App.).

Here two federal courts, both presumably familiar with Texas law (see *Sims* v. *United States,* 359 U.S. 108, 114), applied a settled rule of State law to a particular set of facts. The result reached is that which would have obtained in a Texas court. There is no occasion for further review here.

Respectfully submitted,

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APRIL, 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964